

Memorandum 95-61

Inheritance From or Through a Foster Parent or Stepparent

Attached is a staff draft of a Tentative Recommendation on *Inheritance From or Through a Foster Parent or Stepparent*. Under existing law, a foster child or stepchild is treated as a natural child for purposes of inheritance if (1) the relationship with the foster parent or stepparent began during the child's minority and continued throughout the joint lifetimes of the child and foster parent or stepparent, and (2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the child "but for a legal barrier" (usually failure of the natural parent to consent to the adoption). Prob. Code § 6454. This provision was enacted on Commission recommendation, and is intended to carry out the likely intent of an intestate decedent where a foster child or stepchild is involved.

Case law conflicts on whether the legal barrier to adoption must have existed throughout the joint lifetimes of the foster parent or stepparent and the child, or merely when the adoption was contemplated or attempted. The attached draft would codify case law holding that the legal barrier must exist only at the time the adoption was contemplated or attempted, and would reject the one case holding that the legal barrier must exist for life. The rejected case would effectively nullify the statute because parental consent is not needed to adopt an adult, so no foster child or stepchild could ever show the existence of a lifelong legal barrier to adoption.

The article in the Los Angeles Lawyer cited in footnote 7 in the attached draft calls for complete repeal of Section 6454, saying it is vague and injects "uncertainty into an area where predictability is essential." The article in the San Francisco Daily Journal cited in footnote 7 suggests that the contradictory case law be addressed by repealing Section 6454 and "beginning anew." Section 6454 is a California innovation, has not been incorporated into the Uniform Probate Code, and apparently has not been enacted in any other state. Nonetheless, the staff does not favor its repeal. It appears to carry out the likely intent of an intestate decedent in most cases. Predictability is not so essential for intestate

decedents, because one normally does not intentionally die without a will in reliance on the distribution expected under intestate succession law.

Section 6454 may cause lack of predictability for wills and trusts. Stepchildren and foster children “are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for intestate succession.” Prob. Code § 21115. This rule applies to construction of a will, trust, deed, and any other instrument. *Id.* § 21101. Nonetheless, it seems preferable to carry out the likely intent of the testator or trustor than to achieve greater predictability by excluding a claimant who has a justifiable claim, and to accept the possibility of more litigation as the price for approximating fair results in most cases.

Although Section 6454 does engender more litigation than if foster children or stepchildren had no inheritance rights, it is not completely open-ended. The requirement that it be shown by clear and convincing evidence that the adoption would have occurred if the legal barrier had not existed should eliminate marginal or dubious claims.

Professor Edward Halbach has reviewed the attached draft, and thinks it is sound.

The staff recommends the Commission approve the Tentative Recommendation for distribution to interested persons for comment, including the State Bar Estate Planning, Trust and Probate Law Section.

Respectfully submitted,

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

TENTATIVE RECOMMENDATION

Inheritance From or Through a Foster Parent or Stepparent

November 1995

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **January 5, 1996.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

Existing law treats a foster child or stepchild as a natural child for purposes of inheritance if the relationship with the foster parent or stepparent began during the child's minority and continued throughout their joint lifetimes, and it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the child "but for a legal barrier." This recommendation would codify case law holding that the legal barrier to adoption need only exist at the time the adoption was contemplated or attempted, and rejects a case holding that the legal barrier must exist throughout their joint lifetimes.

INHERITANCE FROM OR THROUGH A FOSTER PARENT OR STEPPARENT

For the purpose of intestate succession, a foster child or stepchild is treated as having a natural parent-child relationship with the foster parent or stepparent if their relationship began during the child's minority, continued for their joint lifetimes, and it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the child "but for a legal barrier."¹ The cases conflict on whether the legal barrier must exist during the joint lifetimes of the foster parent or stepparent and the child, or merely at the time the adoption was contemplated or attempted.²

The legal barrier to adoption is usually the natural parent's failure to consent.³ If it is clear the foster parent or stepparent would have adopted the child but for the natural parent's refusal to consent, to treat the relationship between the foster parent or stepparent and the foster child or stepchild the same as a natural relationship for the purpose of intestate succession carries out the likely intent of the decedent and avoids denying inheritance on technical or legalistic grounds. But parental consent is not required to adopt an adult.⁴ Thus a requirement that the legal barrier must continue for life would preclude inheritance by virtually all adults from or through their foster parent or stepparent.⁵ Such a construction would frustrate the underlying purpose of the statute to carry out the likely intent of the intestate decedent.⁶

The Commission recommends codifying case law limiting the existence of the required legal barrier to adoption to the time when adoption was contemplated or attempted.⁷ This relaxation of the standards for inheritance should not lead to an

1. Prob. Code § 6454.

2. Compare *Estate of Cleveland*, 17 Cal. App. 4th 1700, 22 Cal. Rptr. 2d 590 (1993) (legal barrier must exist during joint lifetimes of foster parent or stepparent and foster child or stepchild), with *In re Estate of Smith*, 35 Cal. App. 4th 1754, 42 Cal. Rptr. 2d 42 (1995) (legal barrier need only exist when adoption was contemplated or attempted), and *In re Estate of Stevenson*, 11 Cal. App. 4th 852, 14 Cal. Rptr. 2d 250 (1992) (same).

3. *In re Estate of Stevenson*, 11 Cal. App. 4th 852, 14 Cal. Rptr. 2d 250, 257 (1992). See also Prob. Code § 6454 Comment.

4. Fam. Code § 9302(b).

5. *In re Estate of Smith*, 35 Cal. App. 4th 1754, 42 Cal. Rptr. 42, 45, 48 (1995).

6. See *In re Estate of Smith*, 35 Cal. App. 4th 1754, 42 Cal. Rptr. 42, 43 (1995); *Estate of Cleveland*, 17 Cal. App. 4th 1700, 22 Cal. Rptr. 2d 590, 594 (1993).

7. This view is supported by the commentators. See 17 CEB Estate Planning & California Probate Reporter 22 (Aug. 1995) (decision and reasoning of *Estate of Smith* "seem sound"); San Francisco Daily Journal, July 18, 1995, at 5 (decision in *Estate of Smith* "makes more sense" than in *Estate of Cleveland*). One article calls for repeal of Section 6454, finding the section "vague" and that it injects "uncertainty into an area where predictability is essential." Meadow & Loeb, *An Anomalous Rule of Intestate Succession Triggers a Standoff in the Courts of Appeal*, 17 L.A. Law., No. 4, June 1994, at 34. But much of this article was devoted to showing how the conflict in the case law is the cause of much of the uncertainty. The recommended legislation will resolve that conflict and eliminate the uncertainty from that cause.

increase of manufactured claims because of the requirements that the parent-child relationship must continue throughout their joint lifetimes, and that evidence of intent to adopt must be clear and convincing.⁸

8. See Prob. Code § 6454.

RECOMMENDED LEGISLATION

Prob. Code § 6454 (amended). Foster parent or stepparent

6454. For the purpose of determining intestate succession by a person or the person's issue from or through a foster parent or stepparent, the relationship of parent and child exists between that person and the person's foster parent or stepparent if both of the following requirements are satisfied:

(a) The relationship began during the person's minority and continued throughout the joint lifetimes of the person and the person's foster parent or stepparent.

(b) It is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier existing at the time the adoption was contemplated or attempted.

Comment. Subdivision (b) of Section 6454 is amended to require that the legal barrier to adoption must have existed at the time the adoption was contemplated or attempted. This codifies Estate of Smith, 35 Cal. App. 4th 1754, 42 Cal. Rptr. 42 (1995), and Estate of Stevenson, 11 Cal. App. 4th 852, 14 Cal. Rptr. 2d 250 (1992), and rejects Estate of Cleveland, 17 Cal. App. 4th 1700, 22 Cal. Rptr. 2d 590 (1993).